EQUAL EMPLOYMENT
ADVISORY COUNCIL

SUITE 1200
1015 FIFTEENTH STREET, NW
WASHINGTON, DC 20005

TEL 202/789-8650
FAX 202/789-2291

May 28, 2004

VIA ELECTRONIC MAIL TO
OFCCP-PUBLIC@DOL.GOV

Joseph DuBray, Jr.
Director, Division of Policy, Planning and
Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
Room C-3325
200 Constitution Avenue, NW
Washington, DC 20210

Re: **Comments of the Equal Employment Advisory Council on the OFCCP's Notice of Proposed Rulemaking To Amend 41 C.F.R. Part 60-1 — Obligation To Solicit Race and Gender Data for Agency Enforcement Purposes (RIN 1215-AB45)**

Dear Mr. DuBray:

The Equal Employment Advisory Council ("EEAC") welcomes the opportunity to file these written comments on the Office of Federal Contract Compliance Programs' ("OFCCP") proposed rulemaking to amend its recordkeeping regulations at 41 C.F.R. Part 60-1 (hereinafter the "Proposed Conforming Regulations"), notice of which was published in the *Federal Register* on March 29, 2004. 69 Fed. Reg. 16446.

OFCCP's Proposed Conforming Regulations, which would require federal contractors to collect, maintain, and analyze demographic information on their "Internet Applicants," relate directly to the recent issuance of "interpretive guidance" to the Uniform Guidelines on Employee Selection Procedures ("UGESP"), jointly adopted by OFCCP, the Equal Employment Opportunity Commission ("EEOC"), the Department of Justice ("DOJ"), and the Office of Personnel Management ("OPM") (hereinafter the "UGESP Agencies").[1] 69 Fed. Reg. 10152 (March 4, 2004). That interpretive guidance expressly authorizes each of the UGESP Agencies to issue "additional guidance or regulations that will allow each agency to carry out its specific enforcement responsibilities," and OFCCP has made clear that it intends this rulemaking effort to "amend [its] recordkeeping requirements ... to *conform* to the new interpretive guidance." 69 Fed. Reg. 16446 (emphasis added).

[1] A copy of EEAC's May 3, 2004 comment letter on the information collection requirements associated with the UGESP Agencies' interpretive guidance is attached hereto. EEAC respectfully requests that this comment letter be included in its entirety in the record for this proposed rulemaking.

We emphasize this intended "conforming" nature of OFCCP's Proposed Conforming Regulations because, in our view, were they to be read, interpreted, implemented, or enforced in a manner not consistent with the UGESP Agencies' proposed interpretive guidance, we respectfully submit that OFCCP's proposed definition of an "Internet Applicant" effectively would force most large employers to significantly limit their use of the Internet as a recruitment and selection tool — a result which we do not believe OFCCP intends and which cannot be reconciled with the UGESP Agencies' stated goal of *encouraging* the "scope and speed of this technology [because] it advertises employment opportunities to a broad audience." 69 Fed. Reg. 10153.

Specifically, by not stating explicitly that its definition of an "Internet Applicant" is indeed consistent with the proposed interpretive guidance's definition of a "UGESP Applicant," and by unnecessarily departing from the proposed interpretive guidance's conditions for becoming a "UGESP Applicant" in two critical respects, OFCCP's Proposed Conforming Regulations could be read to impose upon those federal contractors who use the Internet as a recruitment and selection tool an enormously burdensome recordkeeping and compliance regimen having no utility at all to the effective monitoring or investigation of their recruitment and selection practices. Our comments will not only identify these potentially fundamental inconsistencies between OFCCP's definition of an "Internet Applicant" and the UGESP Agencies' definition of a "UGESP Applicant," they also offer recommendations for modifying the text of the Proposed Conforming Regulations to help ensure that these two important definitions remain in harmony with each other, rather than in potential conflict.

Finally, as we did in our comments on the UGESP Agencies' interpretive guidance, EEAC commends OFCCP for undertaking this effort to clarify how federal equal employment opportunity and affirmative action ("EEO/AA") recordkeeping and compliance requirements apply when the Internet and related technologies are used as job hunting tools by job seekers, and as recruitment and selection tools by employers. We believe that OFCCP's Proposed Conforming Regulations, as modified and clarified along the lines we suggest herein, will result in the establishment of reasonable and effective mechanisms for employers to monitor — and for OFCCP to enforce — compliance with federal EEO/AA requirements applicable to Internet-based recruitment and selection practices.

Statement of Interest

EEAC is the nation's largest nonprofit association of employers dedicated exclusively to the advancement of practical and effective programs to eliminate workplace discrimination. Founded more than 25 years ago, EEAC's membership now includes more than 330 of the nation's largest and most progressive private sector companies that, collectively, employ more than 19 million workers in the U.S. alone.

All of EEAC's member companies are employers subject to the compliance, recordkeeping, and reporting requirements established by Title VII of the Civil Rights Act of 1964 and its implementing regulations, and nearly all of our members also are federal contractors subject to the affirmative action and nondiscrimination compliance requirements established by Executive Order 11246, the Rehabilitation Act of 1973, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, and their implementing regulations. Each year, EEAC members receive millions of résumés and other expressions of interest in employment through the Internet and related technologies. They thus have a significant stake and interest in ensuring that all federal recordkeeping and compliance requirements pertaining to their use of the Internet as a recruitment and selection tool are efficient and effective in accomplishing the overarching objective of ensuring that their employment practices are nondiscriminatory.

Two Principle Methods by Which Employers Use the Internet and Related Technologies To Support Their Recruitment and Selection Strategies

Before presenting our specific comments and recommendations on OFCCP's Proposed Conforming Regulations, EEAC believes it would be beneficial to describe the two principle ways in which employers use the Internet and related technologies to support their overall recruitment and selection strategies. Recognizing these two different approaches to Internet-based recruitment and selection is essential to understanding how OFCCP's Proposed Conforming Regulations, if not further clarified, arguably could significantly restrict one of the most effective and efficient ways the Internet is used to support employment-related objectives.

In the course of extensive discussions with our member companies concerning the practical implications of OFCCP's Proposed Conforming Regulations and the UGESP Agencies' interpretive guidance, it became clear to EEAC that many large employers use the Internet and related technologies in one or both of two ways: as a "position-specific" recruitment and selection mechanism, and/or as a general or "broadcast" recruitment mechanism.

Position-Specific Recruitment and Selection

In the context of the Internet and related technologies, "position-specific" recruiting and selection occurs when an employer acts to fill a particular position by posting to its own website — or that of a third-party — a specific open position that the employer is trying to fill. Employers who implement such a process generally will have an opportunity to communicate to on-line job seekers essential information about the specific open position, including the qualifications necessary for the job (such as a specific degree, certification, or license), the skills necessary for the job (such as the ability to use a specific type of equipment or software), and the conditions of the job (such as its geographic location, its travel requirements, and its shift or hours requirements). This process also gives on-line job seekers the opportunity to review and assess this essential, position-specific information to determine whether they want to be considered for it, and, if so, to follow the employer's standard procedures for applying. Once the

on-line job seeker applies for the position, the employer may then leverage the technological capabilities of the Internet and related technologies to begin making its selection decisions from among those who have applied.

By way of example, one large EEAC member company (hereinafter referred to as "Company A") has informed us that at any given time, its website contains position-specific information for an average of more than 3,000 specific open positions for which it is recruiting. On-line job seekers are able to review the essential information about these positions (*i.e.*, their qualifications requirements, their skills requirements, and their conditions), make an informed determination as to their interest, and submit an expression of interest on-line for one or more of these specific open positions. Company A then uses Internet-related technology to begin making its selection decisions from among all those who applied. Importantly, however, Company A's website permits *anyone* who wants to submit an expression of interest in any open position to do so, regardless of their qualifications. Accordingly, an on-line job seeker who is educated and trained in the nursing occupation, for example, would be permitted by Company A's website to apply for a financial analyst position that clearly requires different qualifications and skills which the trained nurse might not possess.

Setting aside the issue of qualifications for the moment, the UGESP Agencies' proposed interpretive guidance makes clear that such a "position-specific" exchange of information must take place in order for an on-line job seeker to be an applicant:

> The core of being an 'applicant' is asking to be hired to do a particular job for a specific employer. An individual can only accurately assess her interest in an employment opportunity of which she is aware.

69 Fed. Reg. 10156.

The interpretive guidance also makes clear that individuals who submit expressions of interest in multiple positions or who submit general expressions of interest in working for an employer in a category of jobs are *not* applicants:

> Furthermore, even if the individual expresses an interest in a whole category of positions in response to an employer's solicitation — for example, marketing opportunities — *the individual is not an applicant* but is identifying the kinds of positions in which she may be interested. She is not indicating an interest in a *particular position* with a specific employer. It is only with respect to a *particular position* that an individual can assess her interest and choose whether or not to apply.

69 Fed. Reg. 10156 (emphasis added). Example B (the "Game Park" example) within the interpretive guidance provides another illustration of a position-specific recruitment and selection process.

General or "Broadcast" Recruitment

In contrast to a position-specific process, an employer engaging in "broadcast" recruitment in the context of the Internet and related technologies generally establishes a mechanism by which on-line job seekers can submit their résumés or register their expressions of interest in being considered only for a range of positions, a broad category of positions, or in some cases simply any position for which the employer might currently or at some point in the future consider the individual to be a good candidate. Such a process does not involve any exchange of information about a specific open position, either from the employer "outbound" to a job seeker, or from a job seeker "inbound" to the employer. It simply is one way — and in many cases a very effective and efficient way — for an employer to recruit candidates for its positions, and for a job seeker to let the employer know that, if the right opportunity presented itself, he or she *might* be interested in working for that employer. It is, essentially, the electronic equivalent of a professional or employer publication or listing of potential *recruits*. Once the on-line job seeker submits his or her résumé or registers his or her general expression of interest, the employer may then use the Internet and related technologies to focus its *recruitment* efforts between and among those who have done so.

Another of our member companies (hereinafter referred to as "Company B") has informed us that it employs such a broadcast recruitment process. Company B's website contains general information about the company and the types of jobs that it from time to time might be recruiting for, and allows on-line job seekers to submit their résumés for potential consideration without requiring them to identify a specific position or even a broad range of positions in which they might be interested. As specific open positions become available, Company B then uses the Internet or other technology to begin identifying those who might be good recruits for these positions from those résumés submitted into its database. Company B then contacts these job seekers to inform them of the specific open position that is available and to determine whether the job seeker is interested in that position. If so, the job seeker is invited to apply for the position. If not, Company B simply moves on to contact other job seekers within the database who might be good recruits.

Much as the UGESP Agencies' interpretive guidance makes clear that a position-specific exchange of information is necessary for an on-line job seeker to be deemed an applicant under the UGESP, so too does the interpretive guidance make clear that a broadcast recruitment process such as the one employed by Company B is just that — a recruitment process. An individual job seeker who registers his or her general expression of interest through such a process is, without question, not an applicant for any position unless and until he or she is informed about a particular position and expresses an interest in it. Everything that occurs prior

to this exchange involves potential "recruits" and not applicants, as the following language from the interpretive guidance explains:

> (95) Q: Is Internet recruitment, like traditional recruitment, exempt from UGESP requirements?
>
> A: Yes. As a business practice, recruitment involves identifying and attracting potential recruits to apply for jobs. Under UGESP, "recruitment practices are not considered * * * to be selection procedures," and the UGESP requirements geared to monitoring selection procedures do not apply. Just as recruiters traditionally researched paper copies of professional and employer publications and listings *to identify potential recruits*, so recruiters now search huge bodies of information online — which include new resources such as personal Web sites and a variety of resume databases — for the same purpose. Online recruitment also involves organizing the search results into usable formats.

69 Fed. Reg. 10156 (emphasis added). Example A (the "Cable Customer Service" example) and Example C (the "Printer" example) within the interpretive guidance acknowledge and provide additional illustrations of broadcast recruitment processes.

Because the position-specific and broadcast processes are not mutually exclusive, many companies employ both (in some cases simultaneously) as part of their on-line recruitment and selection strategy. For instance, several EEAC member companies have informed us that they use a position-specific process for low-turnover or unique positions, whereas these same companies employ a broadcast process for their high-turnover, high-incumbency, or constant-need positions. Whichever process is used by an on-line job seeker, his or her résumé or expression of interest usually ends up in the same database that the employer later uses to support its recruitment and selection processes.

With these two descriptions in mind, we now turn to our assessment of the practical impact of OFCCP's Proposed Conforming Regulations as well as our specific comments and recommendations for modifying them to ensure their consistency with and conformity to the important principles established by the UGESP Agencies in their interpretive guidance.

<u>A Definition of "Internet Applicant" That Builds Upon the UGESP Agencies' Interpretive Guidance Is Critical To Preserving the Ability of Federal Contractors To Engage in Broadcast Recruitment</u>

EEAC's principal concern with the OFCCP's Proposed Conforming Regulations is that, in their current form, they reasonably could be interpreted in a way that is inconsistent with the

UGESP Agencies' interpretive guidance, and as a result limit — if not end entirely — the ability of federal contractors to use the Internet as part of their recruitment and selection process.

Importantly, we do not believe that OFCCP intends its Proposed Conforming Regulations to establish a nondiscrimination compliance monitoring and enforcement model for federal contractors that is fundamentally different from the nondiscrimination compliance and enforcement model contemplated by the UGESP Agencies. Nor do we believe that the enormously burdensome recordkeeping regimen that could result from OFCCP's Proposed Conforming Regulations would serve any meaningful purpose, and certainly not one of the principle objectives OFCCP is seeking to accomplish through this rulemaking; that is, to "maximize the likelihood that agency investigation resources are committed to workplaces where systemic discrimination exists and to minimize commitment of resources to workplaces where such systemic discrimination is absent." 69 Fed. Reg. 16447. While we certainly recognize the unique role OFCCP plays in enforcing federal nondiscrimination requirements among federal contractors, we submit that these federal *nondiscrimination* requirements are, with respect to recruitment and selection practices, fundamentally the same irrespective of an employer's status as a federal contractor.

Advancing these federal nondiscrimination requirements no doubt was the focal point of the UGESP Agencies in their deliberations over and issuance of the proposed interpretive guidance. Accordingly, we respectfully submit that the final "Internet Applicant" definition adopted by OFCCP in its *conforming* regulations should not present an *alternative* set of conditions to those unambiguously established by the UGESP Agencies in defining an applicant.

OFCCP Has Made Clear That Its Proposed Conforming Regulations Are Intended To Conform to and Implement the Interpretive Guidance, Not Depart From or Present an Alternative to It

While it may seem rather obvious, it deserves emphasizing here for the record that OFCCP's March 29, 2004 *Federal Register* notice unequivocally states that the agency's Proposed Conforming Regulations are intended to conform to and implement the interpretive guidance, not to depart from or present an alternative to it. Specifically, in the "Summary" section accompanying the Proposed Conforming Regulations, OFCCP states that "[t]he rule proposed today would amend OFCCP recordkeeping requirements for OFCCP compliance monitoring and other enforcement purposes *to conform* to the new interpretive guidance promulgated by the UGESP [A]gencies." 69 Fed. Reg. 16446 (emphasis added). In the "Supplementary Information" section of its *Federal Register* notice, OFCCP goes on to state that "[t]he rule proposed today *would implement,* for OFCCP compliance monitoring and other enforcement purposes, the new interpretive guidance promulgated by the UGESP [A]gencies." 69 Fed. Reg. 16447 (emphasis added). EEAC believes this language evinces an acknowledgment by OFCCP that, as a UGESP agency, it may not in its Proposed Conforming

Regulations confer "Internet Applicant" status upon job seekers who are not first "applicants" for UGESP purposes.

The UGESP Agencies' Interpretive Guidance Is Unambiguous in Requiring That Three Conditions Must Be Met Before a Job Seeker Becomes an Applicant in the Context of the Internet

The UGESP Agencies' interpretive guidance is unambiguous in requiring that three specific conditions be met in order for an individual to be considered an applicant in the context of the Internet. Question and Answer No. 96 of the interpretive guidance read as follows:

> (96) Q: For recordkeeping purposes, what is meant by the term "applicant" in the context of the Internet and related electronic data processing technologies?
>
> A: The term 'applicant' is discussed in the 1979 set of questions and answers promulgated by the agencies to clarify and provide a common interpretation of UGESP. Question & Answer 15 of that publication states:
>
> The precise definition of the term 'applicant' depends upon the user's recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities.
>
> In order for an individual to be an applicant in the context of the Internet and related electronic data processing technologies, the following *must* have occurred:
>
> (1) The employer has acted to fill a particular position;
>
> (2) The individual has followed the employer's standard procedures for submitting applications; *and*
>
> (3) The individual has indicated an interest in the particular position.

69 Fed. Reg. 10155 (emphasis added) (footnotes omitted).

Without all three of these conditions being met, an on-line job seeker cannot be considered an applicant for purposes of monitoring or enforcing an employer's compliance with federal nondiscrimination requirements, not by the UGESP Agencies collectively, and not by any of the UGESP Agencies individually.

OFCCP's Proposed Definition of "Internet Applicant" Could Limit, If Not End, Federal Contractors' Ability To Engage in Broadcast Recruitment

The Proposed Conforming Regulations arguably establish a definition of "Internet Applicant" that is inconsistent with the interpretive guidance to which they are supposed to conform. Specifically, OFCCP has proposed language in its definition of Internet Applicant that

departs from the interpretive guidance in two critical respects which, taken together, could confer "Internet Applicant" status to millions of unqualified and uninterested job seekers just because a federal contractor conducts an electronic search on their résumés or expressions of interest that now reside in the contractor's résumé database.

The Proposed Conforming Regulations would establish the following four-part definition of "Internet Applicant":

> (1) Internet applicant means any individual who:
>
> > (i) Submits an expression of interest in employment through the Internet or related electronic data technologies;
> >
> > (ii) The employer considers the individual for employment in a particular open position;
> >
> > (iii) The individual's expression of interest indicates the individual possesses the advertised, basic qualifications for the position; and
> >
> > (iv) The individual does not indicate that he or she is no longer interested in employment in the position for which the employer has considered the individual.

41 C.F.R. § 60-1.3 (proposed) 69 Fed. Reg. 16449.

It is the first and fourth definitional components that we believe substantially depart from the interpretive guidance, and which we believe would discourage, if not prohibit federal contractors from engaging in broadcast recruitment. First, rather than requiring an on-line job seeker to indicate an interest *in the particular position which the employer is acting to fill*, the proposal would require only that the individual "submit[] an expression of interest in employment through the Internet or related electronic data technologies." Second, on-line job seekers who meet the first three criteria above automatically would become and remain an Internet Applicant unless they indicate that they are no longer interested in the position for which the employer has considered them.

The cost and burden impact of this proposed "Internet Applicant" definition upon federal contractors who engage in broadcast recruitment would be devastating. Federal contractors such as Company B above arguably would be required to solicit, maintain, and analyze demographic data from every single expression of interest that is submitted by an on-line job seeker and "considered" by its recruiters when searching the database for potential candidates for specific open positions. If Company B's electronic searches of all records within the database were deemed to amount to "consideration" for employment in a particular open position, then OFCCP's proposed definition of "Internet Applicant" would compel this outcome because:

- all those whose expression of interest was stored in the database "submit[ted] an expression of interest in employment through the Internet or related electronic data technologies" by using Company B's general or broadcast recruitment channel;

- Company B would not be permitted to limit the pool of Internet Applicants to those who possessed the "advertised, basic qualifications for the position" because Company B never *advertised* those qualifications and may never do so; and

- Company B has not yet provided and likely never will provide each and every single individual the opportunity to indicate that he or she is no longer interested in the position for which Company B arguably has "considered" him or her.

Therefore, under OFCCP's Proposed Conforming Regulations, each and every job seeker whose résumé was in Company B's database would be an "Internet Applicant," and Company B would be required not only to solicit and maintain gender, race, and ethnicity data for all of them, but presumably also to factor those data into any statistical analyses of its selection practices. Obviously, we do not believe that this is the result intended by OFCCP.

Even those federal contractors primarily employing a position-specific process arguably would be negatively impacted by OFCCP's proposed "Internet Applicant" definition. This is so because these companies often will use the résumé databases they have established over time to mine for potential candidates for future positions. Indeed, why wouldn't they? These databases, which may contain tens of thousands or even millions of résumés, could include job seekers who might be ideal recruits for positions other than the one for which they had applied. Leveraging this recruiting resource is important to employers for several reasons, not the least of which are speed (they may avoid the time-consuming process of advertising the position and processing the expressions of interest that are received in response) and efficiency (they may be able to entirely avoid the cost of recruiting for the position because ideal candidates may already be in the database).

Continuing our Company A example from above, the job seeker who is educated and trained as a nurse and who applied for the financial analyst position posted on Company A's website may not have been selected for that position, but if Company A were to later have an opening for a position requiring a nursing education and nursing experience, Company A should be permitted to search its database for nursing recruits who could then be encouraged to apply. It should be able to do so without conferring "Internet Applicant" status upon every single one of the more than one million job seekers whose résumés are in the database. As we explained above, unless OFCCP's definition of "Internet Applicant" is modified as suggested below, it appears to us that all of these job seekers whose résumés might be deemed to have been "considered" by Company A in its search for nurses would be considered "Internet Applicants" for the nursing position, assuming that Company A does not advertise the basic qualifications for the nursing position.

OFCCP's Definition of Internet Applicant Should Be Modified To Ensure Conformity and Consistency With the Interpretive Guidance

We respectfully suggest that there are at least two approaches that OFCCP could take in its final rule to help ensure that its definition of "Internet Applicant" is and remains in harmony with the interpretive guidance. First, OFCCP could state explicitly in the final rule's Preamble "Supplementary Information" that a job seeker simply cannot be an "Internet Applicant" for OFCCP recordkeeping and compliance purposes unless all three conditions established by the interpretive guidance have been satisfied: (1) the employer has acted to fill a particular position; (2) the job seeker has followed the employer's standard procedures for submitting applications; and (3) the individual has indicated an interest in the particular position. This clarifies the agency's intent to issue a "conforming" regulation.

Alternatively, OFCCP could incorporate where appropriate in its definition of "Internet Applicant" the relevant "position-specific" language adopted by the UGESP Agencies in their interpretive guidance. Under this approach, the first definitional element of an "Internet Applicant" would require that the individual "submits an expression of interest in employment through the Internet or related electronic data technologies, and who initially or subsequently indicates interest in a particular position." Were this modification to be made, no further modification of the fourth definitional element would be necessary. Again, this modification is consistent in clarifying that this is a conforming regulation.

A Definition of "Internet Applicant" That Is Not Consistent With the UGESP Agencies' Interpretive Guidance Would Require a Complete and Accurate Burden Accounting Under the Federal Paperwork Reduction Act

The federal Paperwork Reduction Act ("PRA") requires federal agencies to provide a full and accurate accounting of the recordkeeping and reporting burdens associated with their regulatory and information collection requirements, and to receive approval from the Office of Management and Budget ("OMB") before imposing those requirements on the public. Importantly, OFCCP's PRA statement accompanying the Proposed Conforming Regulations states that "the paperwork burden associated with OFCCP's proposed rule is covered by OMB Number 3046-0017," the information collection associated with the UGESP (including the recently proposed interpretive guidance) and for which the EEOC maintains PRA clearance. Indeed, OFCCP's PRA statement "repeats verbatim the Paperwork Reduction Act statement submitted by EEOC in support of the above-referenced collection." 69 Fed. Reg. 16448.

OFCCP's reliance on EEOC's PRA accounting for the recordkeeping and reporting burdens associated with its Proposed Conforming Regulations thus suggests that OFCCP intends its Proposed Conforming Regulations to be entirely consistent with the UGESP Agencies' interpretive guidance, and indeed that, in OFCCP's view, these regulations would impose *no*

additional burden on federal contractors beyond what has been accounted for by the EEOC. As our comments make clear, however, the Proposed Conforming Regulations could be read in a way that is inconsistent with the interpretive guidance. If this were in fact the case, OFCCP's March 29, 2004 PRA accounting statement would fall far short of what is required by the PRA, and OFCCP would be required to publish a separate PRA accounting statement for the unique and additional burdens its Proposed Conforming Regulations would impose beyond those already accounted for by the EEOC.

OFCCP Should Amend Its Third Definitional Element of an "Internet Applicant" To Include "Advertised or Established" Basic Qualifications

Our second principal concern regarding the Proposed Conforming Regulations stems from the fact that they appear to permit the use of basic qualifications in defining "Internet Applicant" only in those situations where the contractor has *advertised* them. As illustrated by the above description of broadcast recruitment processes, many federal contractors (and many EEAC members) do not advertise the basic qualifications of every single position for which they recruit using the Internet and related technologies. As we will explain below, the justification for limiting applicant pools to those who possess the "basic qualifications" when those qualifications have been advertised also applies to those situations where the basic qualifications have been *established but not advertised*. Accordingly, EEAC recommends that the third definitional element of "Internet Applicant" be amended in the agency's final rule to require that an individual job seeker's expression of interest indicate "that the individual possesses the advertised or established basic qualifications for the position."

For Reasons Including Cost, Speed, and Efficiency, Federal Contractors Do Not Always Advertise the Basic Qualifications of Their Positions

As illustrated by the broadcast recruitment process described above, many federal contractors do not advertise the basic qualifications of the positions for which they are recruiting. This is the case whether the company is doing its recruiting through the Internet or related technologies, or through more "traditional" recruitment processes such as newspaper advertisements and job fairs. To underscore this point, our members have informed us that they collectively fill tens or even hundreds of thousands of jobs each year without ever "advertising" the basic qualifications for those positions.

There are many reasons why a federal contractor sometimes will elect not to advertise the basic qualifications of its positions. First, there may be no need to advertise the qualifications to anyone because the contractor already is in possession of a database containing large numbers of résumés, some (indeed, many) of which may be from individual job seekers who appear to be ideal candidates for the position the contractor is trying to fill. In such situations, going through the time consuming and costly process of advertising the basic qualifications of that position would add no value to the contractor's recruitment and selection process. In fact, it would

amount only to a needless expenditure of limited human and financial resources, establishing multiple additional steps in the recruitment and selection process solely to satisfy a new federal compliance requirement.

Such would be the case for Company A described above. As mentioned earlier, Company A's résumé database contains more than one million résumés, nearly all of which came into the database through Company A's position-specific Internet recruitment process. Company A has informed us that it often uses *established* basic qualifications when searching this database to successfully identify recruits for positions that were never posted — and likely never will be posted — to Company A's website or otherwise "advertised." Many EEAC member companies have informed us that they follow similar processes when recruiting for their positions.

Permitting Federal Contractors To Limit Their Internet Applicant Pools to Those Who Possess the Basic Qualifications for the Position Only When Those Basic Qualifications Have Been Advertised Will Result in Millions of Unqualified, Uninterested Job Seekers Becoming Internet Applicants

Unfortunately, because OFCCP's Proposed Conforming Regulations would define "Internet Applicant" pools to include only those who possess the basic qualifications *only* when those qualifications have been advertised, federal contractors such as Company A above arguably would be required to confer "Internet Applicant" status to every single expression of interest in their databases whenever they: (1) run electronic searches of those databases that "consider" each expression of interest; and (2) have not advertised the basic qualifications of the position for which they are recruiting. As mentioned above, federal contractors successfully fill many thousands of jobs through such a process each year, most often using legitimate, job-related criteria or qualifications that have been established but not advertised.

The purported rationale for OFCCP seeking to limit federal contractors' consideration of basic qualifications to those that are "advertised" appears to be rooted in the acknowledgment — contained in both the interpretive guidance and the Supplementary Information accompanying the Proposed Conforming Regulations — that it is possible to use Census or other workforce data in lieu of actual applicant flow data for purposes of evaluating whether qualifications-based search screens create a disparate impact on the basis of gender, race, or ethnicity. It appears, however, that OFCCP is of the view that such data can be used in lieu of applicant data only in those limited circumstances where the contractor has advertised the qualifications and thus potentially "discouraged" some individuals from applying because they felt they did not have the necessary qualifications, thereby making the actual pool of applicants an unreliable benchmark against which to analyze the contractor's selection practices. In such "discouraged applicant" cases, workforce benchmark data actually may be a more reliable indicator of who would have applied for the position but for the qualifications. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 329-330 (1977).

As indicated above, however, in broadcast recruiting processes, solicitations of expressions of interest are stated in general terms, and specific qualifications are considered subsequently in light of actual openings to identify those having the desired qualifications — all without the knowledge of those in the database. The absence of "advertised" qualifications in such cases means that nobody is discouraged from submitting their expressions of interest for consideration. Since the actual applicant pool is not skewed by the absence of discouraged applicants, the rationale of *Dothard* does not fit.

OFCCP May Use Labor Force Statistics or Other Relevant Data in the Exercise of Its Prosecutorial Discretion To Analyze and Investigate Nondiscrimination Compliance in Both "Discouraged Applicant" Situations and Where Actual Applicant Data Are Unavailable or Unreliable

While *Dothard* explicitly approved the use of Census or labor force statistics in "discouraged applicant" situations, it did not, explicitly or implicitly, prohibit such statistics from being used in other situations where actual applicant data were unavailable or unreliable. Indeed, *Dothard* itself relies on *Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977), a case in which the Supreme Court approved the use of population statistics to prove hiring discrimination. 431 U.S. at 337 and n. 7. While *Teamsters* also acknowledges the possibility that an applicant may be discouraged by "the manner in which [an employer] publicized vacancies," neither *Teamsters* nor *Dothard* suggest that the use of census data is limited to "discouraged applicant" situations. Indeed, *Griggs v. Duke Power Company*, 401 U.S. 424 (1971) itself allowed the use of census data to analyze the impact of a high school diploma requirement as a selection criterion. 401 U.S. at 430. Accordingly, *Dothard* can just as easily be read to support the possible use of general population data, in appropriate situations, where applicant flow data are unavailable or unreliable. *See Wards Cove Packing v. Atonio*, 490 U.S. 642, 651 n.6 (1989) (noting that "[i]n fact, where 'figures for the general population might . . . accurately reflect the pool of qualified job applicants,' we have even permitted plaintiffs to rest their prima facie cases on such statistics as well." (citing *Teamsters* and *Dothard*))

Accordingly, while actual applicant data unquestionably are preferable in efforts to monitor, analyze, or investigate the impact of an employer's hiring process, numerous courts have permitted the use of Census or other reliable labor force statistics where actual applicant data were unavailable. In *Phillips v. Joint Legislative Committee*, 637 F.2d 1014 (5th Cir. 1981), for example, the Fifth Circuit allowed the use of census data because the employer involved did not identify its applicants by race. While noting that actual applicant flow data are "often the best measurement," and that "other statistical measures are necessarily imperfect in differing ways or degrees," the court approved using census data to establish a prima facie case.

Similarly, courts allow the use of workforce data when applicant flow data are unreliable. For example, in *Equal Employment Opportunity Commission v. American National Bank*,

652 F.2d 1176 (4th Cir. 1981), the employer considered paper applications in much the same way that Company A considers electronic ones. Rather than advertising vacancies, the bank accepted walk-in applications, kept them on file, and screened them when a vacancy appeared. When the EEOC challenged the bank's hiring practices as racially discriminatory, the court permitted the agency to make out a prima facie case using work force statistics to establish underrepresentation of African-Americans. Not surprisingly, the bank sought to rebut using applicant flow data, which the Fourth Circuit also recognized as appropriate. In this case, however, the Fourth Circuit concluded that the bank's applicant flow data were unreliable, reversing the district court's judgment in favor of the bank. *See also Malave v. Potter*, 320 F.3d 321 (2d Cir. 2003) (where data concerning the number of qualified Hispanics who applied for the at-issue promotions were not available, the district court erred in rejecting the plaintiff's statistics, which involved the overall number of Hispanics in the U.S. Postal Service workforce in Connecticut).

Perhaps most importantly for our purposes, a common reason for using census data is when the actual applicant flow data are heavily affected by the company's extensive efforts towards minority recruiting. *See, e.g., Hammon v. Barry,* 826 F.2d 73, 78 n.7 (D.C. Cir. 1987); *Williams v. City of New Orleans*, 729 F.2d 1554, 1562 (5th Cir. 1984); *Carroll v. Sears, Roebuck & Company*, 514 F. Supp. 788, 796 (W.D. La. 1981). In these situations, the OFCCP's refusal to use census data as a tool to evaluate the employer's recruitment and selection practices would penalize the very employers who are using their best efforts to implement E.O. 11246.

Accordingly, there are numerous situations including but not limited to "discouraged applicant" situations, in which OFCCP may and should use Census or labor force statistics to determine, in the exercise of its prosecutorial discretion, whether further investigation of a contractor's recruitment and selection practices would be appropriate.

OFCCP Should Amend the Third Definitional Element of "Internet Applicant" To Permit Federal Contractors To Define Their Internet Applicants as Those Whose Expressions of Interest Indicate That They Possess the Advertised or Established Basic Qualifications for the Position

Given the fact that Census or other reliable labor force statistics may be used to analyze or investigate an employer's selection practices in situations where the qualifications of a position have not been advertised, OFCCP's definition of "Internet Applicant" should not restrict use of such statistics to situations where the qualifications of the position have been advertised. Accordingly, EEAC recommends that OFCCP amend the third definitional element of "Internet Applicant" in its final rule to permit federal contractors to define their Internet Applicants as those whose expressions of interest indicate that they possess the "advertised or established" basic qualifications for the position. In this way, federal contractors would be permitted to use qualifications in defining their "Internet Applicants" when employing a position-specific process, a broadcast process, or both.

OFCCP Should Adopt in Its Final Rule a Definition of "Non-Internet Applicants" That Is Consistent in Principle With Its Final Definition of "Internet Applicants"

In response to OFCCP's express invitation for comments on the issue of whether a dual standard should be established for "Internet Applicants" versus "Non-Internet Applicants," EEAC respectfully recommends that such a dual standard should not be established, and that instead a uniform set of principles be applied both within the context of the Internet and related technologies and outside of it. As we stated in our comments on the UGESP Agencies' interpretive guidance, the UGESP's fundamental legal requirements pertaining to job applicants ought to indeed be *uniform*. We therefore urge OFCCP to adopt a definition of "Non-Internet Applicant" (or simply "Applicant") that is consistent in principle with the final definition of "Internet Applicant" we have urged OFCCP to adopt.

In so doing, we also urge OFCCP to amend the language of 41 C.F.R § 60-1.12(c)(1)(ii) to state that federal contractors must be able to identify the gender, race, and ethnicity of "Non-Internet Applicants" where *practicable*. We make this recommendation because, in the context of the Internet and related technologies, what is "possible" also most often is practicable. Outside the context of the Internet and related technologies, however, what is possible often is *not* practicable. OFCCP's final rule should be modified in this fashion so as not to require federal contractors to engage in burdensome and costly paper-based efforts to solicit gender, race, and ethnicity data from Non-Internet Applicants because doing so conceivably is possible.

OFCCP Should Establish an Effective Date of Its Final Rule No Earlier Than Six Months After Publication To Give Federal Contractors Adequate Time To Modify Their On-line Recruitment and Selection Practices

Finally, our members have specifically requested that we urge OFCCP to establish an effective date of its final definition of "Internet Applicant" that is no earlier than six months after such definition is published in the *Federal Register* as a final rule. As OFCCP no doubt is aware, federal contractors who use the Internet and related technologies to support their recruitment and selection strategies will need at least this much time — and perhaps even more — to adapt their systems and processes to meet all of the compliance requirements resulting from this rulemaking.

Conclusion

For the foregoing reasons, EEAC respectfully requests that OFCCP modify its Proposed Conforming Regulations consistent with the comments and recommendations presented herein. We believe that with such modifications, OFCCP's final rule will be consistent with the agency's intent to issue conforming regulations and will help strengthen and clarify the legal and practical framework around which federal contractors can construct or modify their on-line recruitment

and selection strategies, as well as help both federal contractors and OFCCP in ensuring that important federal nondiscrimination and affirmative action compliance requirements are being met.

Thank you for the opportunity to present our views on this important matter. Please do not hesitate to contact me or any member of the EEAC staff if we can be of further assistance.

Sincerely,

Jeffrey A. Norris
President

cc: Honorable Cari M. Dominguez
Chair, U.S. Equal Employment Opportunity Commission

Honorable Victoria A. Lipnic
Assistant Secretary for Employment Standards, U.S. Department of Labor

Honorable Charles E. James, Sr.
Deputy Assistant Secretary for Contract Compliance, U.S. Department of Labor

Honorable R. Alexander Acosta
Assistant Attorney General, Civil Rights Division, U.S. Department of Justice

Honorable Kay Coles James
Director, Office of Personnel Management

Honorable John D. Graham, Ph.D.
Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget